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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92025859
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Attachments	92025859 Respondent Opposition to Petitioner Motion to Exclude Respondent Supplemental Expert Report.pdf(2832072 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration No. 1147309

For the mark COHIBA

Date registered: February 17, 1981

AND

In the matter of the Trademark Registration No. 1898273

For the mark COHIBA

Date registered: June 6, 1995

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EMPRESA CUBANA DEL TABACO, d.b.a.	:	
CUBATABACO,	:	
	:	
Petitioner,	:	
	:	Cancellation No. 92025859
v.	:	
	:	
GENERAL CIGAR CO., INC. and CULBRO	:	
CORP.	:	
	:	
Respondents.	:	
	:	
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**RESPONDENT’S OPPOSITION TO PETITIONER’S MOTION TO EXCLUDE
RESPONDENT’S SUPPLEMENTAL EXPERT REPORT AND RELATED TRIAL
TESTIMONY OR, IN THE ALTERNATIVE, TO RE-OPEN DISCOVERY
CONCERNING THE SUPPLEMENTAL EXPERT REPORT**

Respondent General Cigar Co., Inc. (“Respondent” or “General Cigar”) hereby submits this opposition to the Motion of Petitioner Empresa Cubana del Tabaco d.b.a. Cubatabaco (“Petitioner” or “Cubatabaco”) for an order striking the Supplemental Expert Report of Respondent’s expert, Richard Carleton Hacker and Mr. Hacker’s related trial testimony, or alternatively to re-open discovery for a three-month period to conduct discovery on the bases of the Supplemental Expert Report and to take a discovery deposition of Mr. Hacker.

INTRODUCTION

For the following reasons, Petitioner's Motion is legally groundless and should be denied by the Board.

First, the facts set forth in the December 30, 2019 Supplemental Expert Report (the "Supplemental Report") of Respondent's expert Richard Carleton Hacker is proper supplementation of Mr. Hacker's original May 31, 2017 expert report (the "Original Report") – indeed, the supplementation is *required* by the Federal Rules of Civil Procedure. The Supplemental Report does not state new opinions; it simply sets forth facts occurring or discovered by the expert after the date of the Original Report that support the expert's original opinions.

Second, the Supplemental Report was timely under the Federal Rules of Civil Procedure, since it was served "by the date" Respondent's pre-trial disclosures were due. Fed. R. Civ. P. 26(a)(2)(E); 26(e)(2)

Third, the additional facts cited in the Supplemental Report are important to the Board's determination of Petitioner's claim, asserted under Lanham Act § 2(d), that General Cigar's registered COHIBA marks for cigars should be cancelled because they are somehow likely to be confused with a "Cohiba" mark that the Cuban Petitioner has never used and cannot legally use in United States commerce. As the Board has already stated in this proceeding, its determination of likelihood of confusion claims is "based on the factual situation *as of the time of trial*." 122 TTABVUE 7 (emphasis added), citing *Hornby v. TJX Cos.*, 87 USPQ2d 1411, 1416 (TTAB 2008).

Normally, in *inter partes* proceedings the Board schedules trial periods to begin five to six months after expert reports are due, so the expert's trial testimony, previewed in the expert

report, generally reflects the factual situation at the time of trial and supplementation is not necessary. Here, however, the Board suspended proceedings on four separate occasions after the Original Report was served, causing substantial delays in the start of trial. The cumulative effect of these suspensions, by December 2019, was that Respondent's trial period was not scheduled to open until January 13, 2020, *thirty-two months* after the date of the May 31, 2017 Original Report. It is necessary for Respondent to have Mr. Hacker testify to the additional facts stated in the Supplemental Report, because otherwise the Board will not be able to determine whether Mr. Hacker's expert opinions are based on "the factual situation at the time of trial."

Fourth, the Supplemental Report (and Mr. Hacker's trial testimony in conformity therewith) does not create unfair surprise, and Respondent will be able to prepare Hacker's cross-examination, including on the new facts, without the need for material additional research or expense. The Supplemental Report sets forth no new opinions, and only four new facts:

- Since the date of the Original Report, Mr. Hacker has become aware that cigar podcasts are an additional source of information about cigars for U.S. cigar consumers. 244 TTABVUE Annex 2 ¶¶ 7-12. Petitioner's claim that it would have to listen to thousands of hours of podcasts in order to question Mr. Hacker on this statement is simply absurd. 244 TTABVUE 2.
- Mr. Hacker participated as an invited guest on cigar podcasts, all in 2019, in which no confusion as to the origin of Respondent's Cohiba cigar was expressed. The total length of these podcasts is about six hours. 244 TTABVUE Annex 2 ¶ 10. In the Motion, Counsel for Petitioner admits that they have already listened to all of Mr. Hacker's podcasts and are prepared to examine him about them. 244 TTABVUE 18.

- Since the date of the Original Report, the Trump Administration has imposed new regulatory restrictions on U.S. citizens traveling to Cuba; the Supplemental Report explains the impact of these changes on U.S. cigar smokers. 244 TTABVUE Annex 2 ¶ 13. Petitioner needs no discovery here because the new regulations are a matter of public record and available on the U.S. State Department website.
- Since the date of the Original Report, three articles have been published in the cigar press which Mr. Hacker cites as supporting his original conclusion of no confusion. The articles are attached to the Supplemental Report and Mr. Hacker can be questioned on them without any significant additional preparation time.

Fifth, denial of the Motion is not inconsistent with the Board's prior denial of Petitioner's motion to designate a new (unnamed) expert after the deadline for disclosing experts. The Federal Rules and the Board's Rules prohibit late designation of an expert witness, but they permit a timely-designated expert to supplement his or her expert report.

Finally, if the Board believes that it is equitable to allow Petitioner to take a further discovery examination of Mr. Hacker on the Supplemental Report as a condition to denying the Motion, Respondent will not oppose that decision. Indeed, as stated below, Respondent already offered to make Mr. Hacker available for a reopened discovery deposition, if Petitioner would waive objection to the timeliness of the Supplemental Report. Petitioner rejected this reasonable condition and instead burdened the Board with their unnecessary Motion. The problem is that Petitioner's alternative demand seeks a three-month period to take additional discovery. That length is highly unreasonable, as it threatens to delay resolution of this 22-year old proceeding

even further. If further discovery is needed, the Board should allow Petitioner no more than one month to schedule and take any supplemental discovery deposition of Mr. Hacker.

RELEVANT PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

Undersigned counsel declares that the factual statement set forth below is true and correct.

Petitioner has provided a lengthy and entirely irrelevant recital of the parties' federal court litigation (the "Federal Action"). Respondent does not concede the accuracy of Petitioner's characterization of the federal courts' rulings, but it is not necessary to contest those issues here since they have no bearing on this Motion.

The procedural facts relevant to this Motion are the following:

1. Under the schedule established by the Board at 106 TTABVUE 1, expert disclosures were due on March 15, 2017. Respondent timely designated Mr. Hacker as its expert on that date. Two days later, Petitioner notified the Board that it would not designate any new expert and would instead rely on expert testimony it presented in the Federal Action in 2003. 104 TTAVBUE 1-2.

2. Mr. Hacker's Original Report, dated May 31, 2017, was timely served by Respondent on Petitioner on that date. As of May 31, 2017, the schedule established by the Board's most recent Order provided that Respondent's Trial Period would open on January 20, 2018. 107 TTABVUE 3; 108 TTABVUE 1.

3. On August 4, 2017, well after the deadline for disclosing experts had past, Petitioner filed a motion for leave to disclose a new (unnamed) expert. 113 TTABVUE 1. Respondent opposed the motion. 117 TTABVUE. On October 23, 2017, the Board suspended

proceedings pending decision of Petitioner's motion. 121 TTAVUE 1. On December 29, 2017, the Board denied Petitioner's motion and ordered proceedings resumed; trial dates were reset so that Respondent's Trial Period closed on July 28, 2018. 122 TTABVUE 10.

4. Less than a month later, on January 24, 2018, Petitioner filed a motion to compel discovery. 124 TTABVUE. Respondent opposed the motion. 127 TTABVUE. On February 7, 2018, the Board suspended proceedings pending decision of this motion. 125 TTABVUE 1. On July 2, 2018, the Board denied Petitioner's motion in part and granted it in part and ordered proceedings resumed; trial dates were reset so that Respondent's Trial Period was to close on January 3, 2019. 131 TTABVUE 9. On September 29, 2018, the Board issued an order which affirmed that trial dates remained as set. 138 TTABVUE 2.

5. On October 22, 2018, the Board granted leave to Respondent for a motion to take the oral cross-examination of Petitioner's testimonial witnesses located outside of the United States, and granted a stipulated two-week suspension of the Petitioner's testimony period. Under the order, Respondent's Trial Period was to close on January 18, 2019. 143 TTABVUE 2.

6. On November 5, 2018, the Board suspended proceedings pending decision on Respondent's motion to cross-examine Petitioner's Cuban witnesses orally. 148 TTABVUE 1.

7. On March 5, 2019, the Board denied Petitioner leave to make a motion to compel, and continued the suspension then in effect. 155 TTABVUE 2-3.

8. On June 14, 2019, the Board denied Respondent's motion to take oral cross-examination of Petitioner's Cuban witnesses. 156 TTABVUE 5. It denied Respondent's motion to take oral direct examination of those witnesses as premature. *Id.* It extended deadlines to permit cross-examination of the witnesses on written questions, and reset the close of Respondent's Trial Period to November 15, 2019. *Id.* at 7.

9. Petitioner sought leave to make a motion to compel or for sanctions while proceedings were suspended, making argument on the merits of the “motion.” The Board found this request improper. 165 TTABVUE 2-5. It stated that proceedings would resume on September 6, 2019, with the close of Respondent’s Trial Period maintained at November 15, 2019. *Id.* at 6.

10. Starting on September 6, 2019, Petitioner began to serve and file testimonial declarations of its trial witnesses. On September 29, 2019 (238 TTABVUE) and October 4, 2019 (239 TTABVUE), Respondent served and filed notices of election to orally cross-examine two of Petitioner’s trial witnesses. One, Alan Willner, was a non-party witness. On October 22, 2019, the Board issued an order suspending proceedings to allow Respondent to cross-examine those witnesses. 241 TTABVUE 2. Because Mr. Willner was not available for cross-examination until December 13, 2019, after the twenty-day period for cross-examination, the Board granted a consented-to motion to extend the time to complete Mr. Willner’s trial deposition, and reset the trial schedule so that Respondent’s pretrial disclosures were due by December 30, 2019, and Respondent Trial Period was to close on February 13, 2020. *Id.*

11. Proceedings are currently suspended until the Board decides Petitioner’s current Motion. 243 TTABVUE 1-2.

12. Respondent served the Supplemental Report on Petitioner on December 30, 2019, which was timely since the supplementary expert disclosures were made “by the time [Respondent’s] pretrial disclosures under Rule 26(a)(3) are due.” Fed. R. Civ. P. 26(e)(2); Declaration of Andrew L. Deutsch (“Deutsch Decl.”), ¶ 4, Annex 1.

13. Over a week after the Supplemental Report was served, counsel for Petitioner, by letter dated January 8, 2020, objected to the Supplemental Report as improper. *Id.* at ¶ 6, Annex

3. Counsel for Respondent responded by letter dated January 11, 2020, with facts and citations of law showing that the Supplemental Report was proper and would not be withdrawn, and that matters discussed therein would not be excluded from Mr. Hacker's direct testimony. *Id.*, ¶ 7, Annex 4. The parties conducted a meet and confer discussion, as required by Fed. R. Civ. P. 37(a)(1) and TTAB Rule § 2.120(f)(1), in an attempt to resolve the dispute.

14. On January 21, 2020, counsel for Respondent offered to permit Petitioner to take a further discovery deposition of Mr. Hacker, limited to the matters in the Supplemental Report, provided that Petitioner agreed not to move to strike the Supplemental Report or Mr. Hacker's trial deposition covering matters discussed in the Supplemental Report, and not to take Mr. Hacker's trial deposition under protest. *Id.*, ¶ 8, Annex 5 (unrelated matters in this e-mail are redacted). Petitioner declined this reasonable offer and stated that it would seek leave from the Board to make a motion to strike the Supplemental Report. *Id.*, ¶ 9, Annex 6 (unrelated matters in this e-mail are redacted).

15. On January 26, 2020, before making its January 28, 2020 call to the Board for leave to make a motion, counsel for Petitioner sent a letter to counsel for Respondent, demanding production of a vast number of documentary materials alleged to be "related" to the Supplemental Report. *Id.* ¶ 10, Annex 7. On February 3, 2020, counsel for Respondent sent a letter in response, rejecting most of Petitioner's demands as beyond the scope of discovery of an expert under Fed. R. Civ. P. 26(a)(2)(B), but providing supplemental information covered by that Rule. *Id.*, ¶ 11, Annex 8.

ARGUMENT

I

THE SUPPLEMENTAL REPORT WAS PROPER SUPPLEMENTATION OF THE EXPERT'S DISCLOSURES AND SHOULD NOT BE STRICKEN

A. The Board Needs Supplementation to Determine Whether the Expert's Opinions on Confusion Are Supported by the Factual Situation at the Time of Trial

The Board has long held that where a party raises a claim asserting likelihood of confusion, its determination of likelihood of confusion claims is “based on the factual situation *as of the time of trial*.” 122 TTABVUE 7 (emphasis added), citing *Hornby v. TJX Cos.*, 87 USPQ2d 1411, 1416 (TTAB 2008). As a result, the Board admits into evidence and considers facts relevant to confusion up through the date of trial, even though they occur or are learned after discovery closes. *Teledyne Techs., Inc. v. W. Skyways Inc.*, 78 U.S.P.Q.2d 1203, 1208 (TTAB 2006). That principle and the plain words of the Federal Rules require denial of the Motion to strike the Supplemental Report.

In the experience of counsel for Respondent, the Board typically schedules *inter partes* proceedings so that around five to six months elapse between the submission of an expert report and trial. As a consequence of this short delay, the facts on which the expert relies are likely to also be the factual situation at the time of trial. But this is not an ordinary *inter partes* proceeding: here, the time delay between the Original Report and the expected submission of the expert's testimonial declaration was about *six times longer* than usual. In this proceeding, Petitioner's extensive motion practice and four successive suspensions caused a *thirty-two month* gap between the date Mr. Hacker's expert report was served and the opening of Respondent's Trial Period (May 31, 2017-January 13, 2020).

The Board should permit supplementation in this unusual circumstance for two reasons. First, because the Board determines the likelihood of confusion based on facts at the time of trial, the Board cannot fairly weigh Mr. Hacker's expert opinion testimony unless it knows that his opinions are supported by current facts.¹ If new facts have arisen or are learned in the preceding three years that bear on the opinion, and they have, the Board is entitled to hear those facts from the expert's mouth in evaluating his opinion. Second, in light of the extreme time gap, it would be unfair to deny Respondent the ability to show that the expert opinion it offers remains valid in light of current facts.

B. The Supplemental Report Was Timely

Petitioner argues that the Supplemental Report was untimely because it was served on December 30, 2019, the same day that the Board set for service of Respondent's Pretrial Disclosures—and further suggests that the Supplemental Report was untimely because of the time that has passed since the close of discovery. This is incorrect on both counts. Rule 26(e)(2) of the Federal Rules of Civil Procedure govern supplementation of discovery disclosures in this proceeding. TBMP § 408.03. The governing language of Fed. R. Civ. P. 26(e)(2), regarding when supplementation of expert disclosures must be made, is unambiguous: supplementation is to be made “by the time the party's pretrial disclosures under Rule 26(a)(3) are due.” “[B]y the time” means “at the time” or “when,” ” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/by%20the%20time>, accessed February 18, 2020., *i.e.*, concurrently with the pretrial disclosures due date, not before that due date. Rule 26(a)(2),

¹ Allowing Mr. Hacker to supplement his report will not “open the floodgates” to late supplementation. The delay here is extraordinary and most issues determined by expert evidence do not depend on the factual situation at the time of trial.

not dictum in a Board decision not involving that Rule, controls when a party may supplement.² In fact, Respondent served the Supplemental Report on counsel for Petitioner by e-mail at 6:04 p.m. EST on December 30, 2019, and Respondent's Pretrial Disclosures at 7:32 p.m. EST that day, so the Supplemental Report *was* served before the Pretrial Disclosures, and thus "by the time" the Pretrial Disclosures were due. Deutsch Decl. ¶¶ 4-5, Annexes 1-2. The Supplemental Report is therefore timely.

C. The Supplemental Report Was Proper Supplementation

A party "*must* supplement or correct its disclosure or response" where the party later learns that the disclosure is "incomplete." Fed. R. Civ. P. 26(e)(1) (emphasis added). For expert reports, "the party's *duty to supplement* extends . . . to information included in the report." *Id.*, 26(e)(2) (emphasis added); *see also* Fed. R. Civ. P. 26(a)(2)(E). The supplementation may involve "additions or changes to . . . information" provided in the original expert report.³ *Id.* at Fed. R. Civ. P. 26(e)(2). Here, the passage of thirty-two months from the date of the Original Report, during which the U.S. cigar market continued to evolve, made the facts recited in the

² *Entravision Commc'ns Corp. v. Liberman Television LLC*, 113 USPQ2d 1526 (TTAB 2015), cited by Petitioner, expressly states that Rule 26(e)(2) was not applicable in that proceeding because pretrial disclosures were not yet due and the applicant had sought to substitute a new expert after the expert disclosure due date, and "[t]hus, it is necessary to analyze the issue under Fed. R. Civ. 37(c)(1)." 113 USPQ2d at 1528 n. 5. The footnote's casual characterization of Rule 26(e)(2) as requiring supplementation "before" the date for pretrial disclosures is thus not only inaccurate, but also dictum without precedential value. Likewise, to the extent that TBMP § 401.03 uses "before," it is the plain "by the time" language of the Rule that prevails, not the administrative characterization thereof. TBMP 408.03, which directly addresses the duty to supplement, quotes Rule 26(e)(2) in full, and states that "[T]he duty to supplement disclosures and discovery responses in proceedings before the Board is governed by Fed. R. Civ. P. 26(e)." Nothing in 37 C.F.R. § 2.120(a)(1) modifies the "by the time" language of Rule 26(e)(2), and "the discovery provisions of the Federal Rules of Civil Procedure are applicable in Board *inter partes* proceedings, except as otherwise provided in 37 C.F.R. § 2.120." TBMP 401.

³ Petitioner asserts that because Hacker does not assert that his Original Report was misleading, the Supplemental Report is improper. 244 TTABVue 19. This argument is inconsistent with a plain reading of Fed. R. Civ. P. 26(e)(1), which allows supplementation whenever a disclosure is "incomplete." Fed. R. Civ. P. 26(e)(1).

Original Report “incomplete,” because they no longer fully reflected the factual situation as of the time of trial, which is the Board’s reference point for likelihood of confusion. It was therefore mandatory for Respondent to supplement its expert’s Original Report.

Petitioner’s argument relies largely on the Board’s decision in *Gemological Inst. of Am., Inc. v. Gemology Headquarters Int’l, LLC*, 111 USPQ2d 1559 (TTAB 2014), but that decision provides no support for striking the Supplemental Report. In *Gemological Inst.*, an opposition proceeding, the applicant admitted that the supplemental expert report it offered contained “additional opinions intended to rebut the . . . testimonial deposition of Opposer’s witness . . . rather than to correct inaccuracies in [applicant’s expert’s] . . . expert report or . . . deposition or *to complete an otherwise incomplete earlier expert report with newly discovered information*. Therefore this report does not qualify as a supplemental expert report under Rules 26(e)(1)(A) and 26(e)(2) .” *Id.* at 1562 (emphasis added).

In glaring contrast, Mr. Hacker’s Supplemental Report was not submitted to rebut any evidence submitted by Petitioner during its trial period. It makes no reference at all to any of Petitioner’s evidence. More importantly, it does not present additional opinions of the expert. It merely cites additional facts, either learned by the witness or occurring after the date of the Original Report, which make the Original Report “complete” and permit the expert to state that his opinion is current.

In the Original Report, which spoke as of May 2017, Mr. Hacker stated that he had been asked to give his opinion whether “potential and actual United States consumers of cigars are likely to be confused as to the source or origin of [Respondent’s and Petitioner’s] cigars or to believe that there is a relationship or affiliation between the makers of these two different cigars.” 244 TTABVUE Annex 1 at ¶ 11. Mr. Hacker cited the 2002 expert reports on which

Petitioner now relies, and opined that they no longer “describe[ed] the American cigar scene today,” due to “rapid advancements in personal communications and the greatly accelerated and improved use of the internet by consumers for information-gathering about cigars as well as for cigar purchasing. As such, today’s cigar smokers and potential cigar smokers are much more sophisticated and informed regarding their knowledge of the products that they use.” *Id.* ¶ 14.

Mr. Hacker cited, as examples of such sources of information available to cigar smokers not existing in 2002 that explained to consumers the differences between the General Cigar COHIBA and the Cuban Cohiba: internet searching and cigar apps (*Id.* ¶ 19), popular cigar websites (*Id.* ¶¶ 20, 26), general information websites (*Id.* ¶ 27), cigar and lifestyle magazines (including Cigar Aficionado and The Robb Report) (*Id.* ¶ 30), and Mr. Hacker’s own book “The Ultimate Cigar Book” (*Id.* ¶ 21). Mr. Hacker thus expressed the ultimate opinion, based on these facts and his experiences, that as of 2017, “given the far greater knowledge of both Cuban and non-Cuban cigar brands by the United States cigar smoker than existed in 2000, and with the ready access to information that can be obtained by the consumer instantly with merely the tap of a key, there is no appreciable confusion among today’s potential and actual premium cigar smokers between the Cuban Cohiba from Habanos and the Dominican or Nicaraguan Cohiba from General Cigar.” (*Id.* ¶ 33).

In the Supplemental Report, Mr. Hacker made clear that he was not expressing new opinions, but simply listing additional information and facts, arising or becoming known to him after May 31, 2017, which he realized made his Original Report incomplete as of December 2019:

I continue to maintain the opinions expressed in the Expert Report. However, since the date of my Expert Report, which is over two and one-half years ago, there have been additional facts occurring which support my opinions but which I obviously was not able to cite in my original Expert Report. I understand that the Board

assesses claims of likelihood of confusion as of the time of trial. Accordingly, my Expert Report is incomplete because it does not provide these facts for the Board's consideration.

244 TTABVUE Annex 2 at ¶ 3.

The “additional facts” cited by Mr. Hacker were “newly discovered information” which was provided to “complete an otherwise incomplete earlier expert report.” *Gemological Inst.*, 111 USPQ2d at 1562. Three out of the four groups of fact – Mr. Hacker's experiences as a guest on cigar podcasts in 2019, the Trump Administration's tightening of U.S. travel to Cuba, and articles in *Cigar Aficionado* and the www.jrcigars.com website – did not exist when the Original Report was written.

The remaining fact – the existence of cigar podcasts as an additional source of information to cigar consumers in the U.S. – was not known to Mr. Hacker in May 2017, as he states in his accompanying declaration submitted in opposition to the Motion. Declaration of Richard Carleton Hacker (“Hacker Decl.”), dated February 13, 2020, ¶ 9. He did not learn about cigar podcasts until 2019, when he was first invited as a guest on a cigar podcast. *Id.* As the Board held in *Gemological Institute*, it is proper for an expert report to be supplemented with “newly discovered information,” 111 USPQ2d at 1562, which includes information in existence at the time of the original report but which was not discovered by the expert until afterwards.

None of the other cases cited in the Motion support striking the Supplemental Report. *Newegg Inc. v. Schoolhouse Outfitters, LLC*, 118 USPQ2d 1242 (TTAB 2015), (244 TTABVUE 10), is non-precedential and had nothing to do with supplementing a report of an timely-disclosed expert opinion. The *Newegg* decision addressed whether to admit the testimony of an expert who was not disclosed until after expert disclosures were due, and was governed not by Fed R. Civ. P. 26(e) but Fed. R. Civ. P. 37, a different rule with different standards. *Southern*

States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003), cited in *Newegg*, 118 U.S.P.Q.2d at 1242, 2015 WL 9906628 at *2 (TTAB 2015). Rule 37 has no application to the timeliness of supplementation and Petitioner’s reliance on the Rule, Motion at 10, should be rejected.

Nor is the Supplemental Report being submitted to “bolster” Mr. Hacker’s previously disclosed opinions. Cf. 244 TTABVue 11. The passage in *Gemological Inst.* that references “bolstering” cites *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306 (M.D.N.C. 2002). See *Gemological Inst.*, 111 U.S.P.Q. 2d at 1562. *Akeva* is readily distinguishable, most importantly, because it is not a trademark proceeding, but a patent infringement suit. The distinction is essential, because likelihood of confusion in a trademark case is measured as of the time of trial, while the question of whether an article infringes a patent is determined as of the time the article is first made, used, sold, or offered for sale. 35 U.S.C. § 271.

In *Akeva*, the plaintiff’s expert performed tests on and issued a report regarding the allegedly infringing elements of the defendant’s shoes. The defendant thereafter offered its own expert’s report which tested the shoes in a different way. “Surprised” by this different test, 212 F.R.D. 310, the plaintiff then notified the defendant of an intention to have its expert perform another test on the shoes, which plaintiff characterized as supplementation. The *Akeva* court excluded the second expert report because it appeared to be impermissible rebuttal of the defendant’s expert report and because the plaintiff’s expert could have conducted his second test before the disclosure deadline for expert reports. *Id.* at 310-11.

Here, Mr. Hacker’s additional facts are not being used to “bolster” his original opinion, but for proper supplementation purposes: to provide information “newly discovered” by the

expert and information not arising until after the date of the Original Report, and thereby to show that the expert's opinions are based on current facts.

D. Receiving the Supplemental Report and the Expert's Related Testimony Will Neither Prejudice Petitioner Nor Materially Delay Completion of Trial

Petitioner will suffer no material prejudice from admission of the testimony covered by the Supplemental Report and will be able to cross-examine Mr. Hacker on those matters without any delay in the trial schedule.

First, Petitioner has already chosen not to engage an expert witness to rebut Mr. Hacker's expert testimony. After Respondent disclosed Mr. Hacker as its testifying expert on March 15, 2017, Petitioner filed a notice with the Board (104 TTABVUE 1-2) stating that the only expert testimony Petitioner would submit were the 2002-03 testimony and reports of Alan Siegel and Alvin Ossip, who testified in the Federal Action. The Board rebuffed Petitioner's attempt to designate a new expert after the deadline for expert designations. 122 TTABVUE.

Second, supplementation will not delay Petitioner's preparation of Mr. Hacker's testimonial cross-examination. Petitioner absurdly maintains that because Mr. Hacker says that cigar podcasts provide an additional source of information about cigars for U.S. cigar consumers, making those consumers better informed about cigars, 244 TTABVUE Annex 2 at ¶ 7, Petitioner's counsel would have to listen to thousands of hours of cigar podcasts in order to examine Mr. Hacker on this statement. 244 TTABVUE 15. This is as nonsensical as saying that you cannot test the truth of a statement that people are better informed about the world by reading newspapers unless you first read every newspaper published in the period prior to the statement. As for asking about the handful of podcasts on which Mr. Hacker has appeared,

counsel for Petitioner admits that they have *already* listened to those podcasts, which were provided to the Petitioner under Fed. R. Civ. P. 26(a)(2). 244 TTABVUE 18.⁴

The other facts which Mr. Hacker cites in the Supplemental Report is a change in the prior Administration's policy toward Cuba which was described in the Original Report as bearing on U.S. cigar smoker travel to Cuba. The change in policy is of public record, see <https://www.state.gov/united-states-restricts-travel-and-vessels-to-cuba/> (June 4, 2019). Finally, the Supplemental Report cites and attaches three articles in the cigar press, published after the date of the Original Report, which further dispel Petitioner's confusion claims. Counsel for Petitioner needs no additional discovery or preparation time to include these subjects in their testimonial cross-examination outline.

Nor is additional documentary discovery appropriate here. After the dispute over supplementation arose, Petitioner demanded that Respondent's experts produce a mountain of documents, including all records of Mr. Hacker's discussions with consumers, conferences and workshops attended since the Original Report, and agendas maintained since then. Deutsch Decl. ¶ 10, Annex 7. But Petitioner has no right to most of these materials, in discovery or at the present time. The scope of non-deposition discovery of experts is defined by Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi), which states what information must be contained in an expert report. In response to Petitioner's demand, Respondent provided supplementary information as to the documents reviewed by Mr. Hacker in rendering the Supplemental Report, his additional writings since the date of the Original Expert Report, and his current expert compensation.

⁴ Petitioner argues that Mr. Hacker's statements in the Original and Supplemental Reports are inaccurate. See, e.g., 244 TTABVUE 18. This simply demonstrates that Petitioner is already prepared to cross-examine the expert about his statements.

Deutsch Decl. ¶ 11, Annex 8. As Respondent met its obligation under Fed. R. Civ. P. 26(a)(2)(B) in full, Petitioner is not entitled to anything further.

Notwithstanding the above, Respondent has already offered to Petitioner the opportunity to reopen discovery for the limited purpose of deposing Mr. Hacker, solely limited to the matters stated in the Supplemental Report. Respondent is still willing to consent to that deposition, without additional document discovery, as a condition of denial of the Motion, provided that the deposition occurs promptly (within a month of the Board's order). Respondent's trial period should then resume so that Respondent can complete its trial submissions and this proceeding can finally progress to a decision.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Board deny the Motion and permit the matters disclosed in the Supplemental Report to be included in the testimonial deposition of Richard Carleton Hacker.

Alternatively, Respondent requests that the Board re-open discovery for the limited purpose of Petitioner taking a further discovery deposition of Mr. Hacker limited to the matters addressed in the Supplemental Report, to be taken within one month of the Board's order at a time and place agreed upon by counsel, with proceedings to be suspended until the completion of that deposition, and with no further document discovery of Mr. Hacker.

Dated: Los Angeles, California
February 18, 2020

Respectfully submitted,

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Telephone: (202) 799-4157

Joshua Schwartzman
DLA PIPER LLP US
1251 Avenue of the Americas
New York, New York 10020-1104
Telephone: (212) 335-4500

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served: **RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO EXCLUDE RESPONDENT'S SUPPLEMENTAL EXPERT REPORT** and supporting documents by transmitting copies via electronic mail to:

David B. Goldstein
Michael Krinsky
Lindsey Frank
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.
14 Wall Street, 30th Floor
New York, NY 10005
(212) 254-1111
dgoldstein@rbskl.com
mkrinsky@rbskl.com
lfrank@rbskl.com

Date: February 18, 2020

/s/ Andrew L. Deutsch

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration No. 1147309
For the mark COHIBA
Date registered: February 17, 1981

AND

In the matter of the Trademark Registration No. 1898273
For the mark COHIBA
Date registered: June 6, 1995

-----	X	
EMPRESA CUBANA DEL TABACO, d.b.a.	:	
CUBATABACO,	:	
	:	
Petitioner,	:	
	:	Cancellation No. 92025859
v.	:	
	:	
GENERAL CIGAR CO., INC. and CULBRO	:	
CORP.	:	
	:	
Respondents.	:	
	:	
-----	X	

**DECLARATION OF RICHARD CARLETON HACKER IN OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE RESPONDENT'S SUPPLEMENTAL
EXPERT REPORT AND RELATED TRIAL TESTIMONY OR, IN THE
ALTERNATIVE, TO RE-OPEN DISCOVERY CONCERNING THE SUPPLEMENTAL
EXPERT REPORT**

RICHARD CARLETON HACKER declares under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I make this declaration in opposition to the Motion of Petitioner Empresa Cubana del Tabaco, d.b.a. Cubatabaco (“Petitioner” or “Cubatabaco”) for an order excluding my Supplemental Expert Report (the “Supplemental Expert Report”) and my providing trial testimony on matters covered in the Supplemental Expert Report, and for other relief (“Motion”). I am personally familiar with the facts set forth below and would testify as to them under oath if called to do so.

2. I am an internationally published and recognized author and authority on cigars. I am the author of a leading book on cigars, *The Ultimate Cigar Book* (now in its fourth edition) and write regularly on the subject of cigars for a primarily United States consumer audience. The details of my expertise in the field of cigars are set out at greater length in paragraphs 4-9 of my May 31, 2017 Expert Report (“Expert Report”), which is annexed as Annex 1 to the Motion. I have been retained by Respondent General Cigar Co., Inc. (“Respondent”) to provide an expert report and expert testimony in this proceeding.

3. My Expert Report set forth my opinion as to whether, at the time of the Report in May 2017, “potential and actual consumers of cigars are likely to be confused as to the source or origin of [the General Cigar Cohiba cigar and the Cohiba cigar produced by Cubatabaco] or to believe that there is a relationship or affiliation between the makers of these two different cigars.” Expert Report ¶ 11. Based on the facts known to me in May 2017, which are set out in detail in the Expert Report, I gave my opinion that U.S. cigar consumers were not confused between the two cigars. *Id.* ¶¶ 23-33. As the Expert Report stated, my opinion was based in large part on the many sources of accurate information about the origin of cigars that had become

available to cigar smokers, which was much greater than the information available in preceding years. *Id.* ¶ 14. I cited in particular the expanded sources of cigar information instantaneously available on the Internet which were known to me at the time. *Id.* ¶¶14-17, 19, 32.

4. My original Expert Report was written shortly after the end of the Obama Presidency, during which the United States re-established diplomatic relations with Cuba and relaxed certain restrictions on U.S. citizens bringing Cuban cigars. I also mentioned this fact in the Expert Report. *Id.* ¶ 22.

5. I was subsequently deposed by attorneys for Cubatabaco on my Expert Report.

6. Due to what I understand were numerous postponements in this proceeding, while my Expert Report was issued at the end of May 31, 2017, I had not been called to give expert trial testimony as of December 2019, which was over thirty months after I completed my Expert Report.

7. In early December 2019, I was contacted by counsel for General Cigar, who informed me that General Cigar's pre-trial disclosures were required to be filed by December 30, 2019 and that any supplementation of my Expert Report would also have to be filed by that date. I was asked whether there had been any factual developments since the date of my Expert Report that may have affected the opinions expressed in my Expert Report, and to discuss preparing a supplemental report to reflect any such developments.

8. At that time, and now, I continued to hold the opinions expressed in my original Expert Report, namely, that U.S. cigar consumers are not confused between the General Cigar Cohiba cigar and the Cuban Cohiba cigar. However, I was by then aware of three factual developments which I believed justified filing a supplemental report.

9. First, at the time of the original report (May 31, 2017), I was not aware of the existence of cigar podcasts, which are programs available for downloading on the internet (either as audio or audio/video) with hosts who discuss cigars, often with guests having expertise in the cigar field, and sometimes with callers dialing-in to ask cigar-related questions of hosts and guests. I first learned about cigar podcasts when I was invited to be a guest on a cigar podcast in July 2019. During 2019, I was thereafter invited as a guest on three other cigar podcasts and two podcasts which are primarily devoted to liquor and spirits but also cover cigar issues. Links to the podcasts are listed as Annex I to this Declaration, and permit a computer user to listen to the podcasts on which I participated. The cumulative time of these podcasts is about six hours.

10. As a result of these experiences, all occurring in 2019, I concluded that cigar podcasts are another source of information that is available to U.S. cigar smokers and which increases consumer knowledge on facts concerning cigars available in the U.S. market. I also noted that neither the hosts nor callers-in on the podcasts where I was a guest expressed any confusion between the General Cigar Cohiba cigar and the Cuban Cohiba cigar. As these facts were not known to me at the time of my Expert Report, I believed that it was appropriate to include information about cigar podcasts and my experience with podcasts in a supplemental expert report.

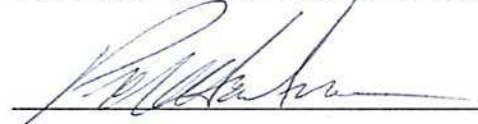
11. Second, after the date of my Expert Report, the new Trump Administration had reversed its predecessor's position on U.S. travel to Cuba, which cut down on the number of U.S. cigar smokers visiting Cuba. I believed that it was important to mention this fact in a supplemental report, and to note that it did not change the opinions expressed in my Expert Report.

12. Finally, counsel for Petitioner made me aware of articles published in *Cigar Aficionado* and on the website of the Internet cigar merchant JR Cigars (www.jrcigars.com) after my May 31, 2019 Expert Report. The *Cigar Aficionado* article, dated July 11, 2019, explained to consumers the educated and knowledgeable nature of U.S. cigar consumers. The two JR Cigars articles, from 2018 and 2019, explained to consumers that the General Cigar Cohiba and Partagas cigars did not originate from the same source as the Cuban cigars as the same name. After reviewing the articles, which were not in existence at the time of my Expert Report, I believed that it was important to cite them as new information supporting my original opinion, and as showing that as of December 2019, U.S. cigar consumers were knowledgeable about cigars and had been further educated about the differences between the General Cigar Cohiba and Cuban Cohiba cigars.

13. All of this additional information was discovered by me or occurred only after the May 31, 2017 date of the Expert Report. Learning the information caused me to realize that while my opinions stated in the Expert Report remained valid and did not need to be changed, the Expert Report was, as of December 2019, incomplete because the facts underlying the opinions were no longer up to date. I therefore concluded that supplementation of those facts was appropriate. I therefore prepared and signed the December 29, 2019 Supplemental Expert Report, attached hereto as Annex I. I understand that on December 30, 2019, counsel for Respondent served the Supplemental Expert Report on counsel for Petitioner.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
February 13, 2020.

RICHARD CARLETON HACKER

A handwritten signature in dark ink, appearing to read 'Richard Carleton Hacker', is written over a horizontal line.

discovery for a three-month period to conduct discovery on the bases of the Supplemental Report and to take a discovery deposition of Mr. Hacker. I have personal knowledge of the matters contained in this Declaration.

3. The purpose of this Declaration is to provide the Board with communications between counsel for Petitioner and counsel for Respondent that are relevant to decision of the Motion.

4. On December 30, 2019, at 6:04 p.m. EST, counsel for Respondent served a copy of the Supplemental Report on Petitioner via e-mail to Petitioner's counsel. A copy of the Supplemental Report so served is attached to Petitioner's Motion at 244 TTABVUE Annex 2. A true and correct copy of the e-mail is attached hereto as **Annex 1**.

5. On December 30, 2019, at 7:32 p.m. EST, counsel for Respondent served Respondent's Pretrial Disclosures on Petitioner via e-mail to Petitioner's counsel. A true and correct copy of the e-mail is attached hereto as **Annex 2**.

6. On January 8, 2020, nine days after Respondent's served the Supplemental Expert Report, counsel for Petitioner sent counsel for Respondent a letter objecting to the Supplemental Expert Report as improper. A true and correct copy of Petitioner's January 8, 2020, letter is attached hereto as **Annex 3**.

7. On January 11, 2020, I sent via e-mail a response letter to Petitioner's counsel's January 8, 2020 letter. A true and correct copy of my January 11, 2020 letter is attached hereto as **Annex 4**.

8. On January 21, 2020, I sent an e-mail to Petitioner's counsel proposing, among other things, a resolution of the dispute over the Supplemental Report. A true and correct copy

of my January 21, 2020 e-mail (redacted to remove information not germane to the dispute of the Supplemental Report) is attached hereto as **Annex 5**.

9. On January 23, 2020, Petitioner's counsel responded with an e-mail rejecting Respondent's proposal for resolution and stating that Petitioner intended to seek leave from the Board to make a motion to strike the Supplemental Report. A true and correct copy of Petitioner's January 23, 2020 e-mail (redacted to remove information not germane to the dispute of the Supplemental Report) is attached hereto as **Annex 6**.

10. On January 26, 2020, Petitioner's counsel sent counsel for Respondent a letter demanding a number of documents and/or admissions allegedly related to the Supplemental Report. A true and correct copy of Petitioner's January 26, 2020 letter is attached hereto as **Annex 7**.

11. On February 3, 2020, I sent a letter responding to the January 26, 2020 letter of Petitioner's counsel. A true and correct copy of my February 3, 2020 letter is attached hereto as **Annex 8**.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 18, 2020.

/s/ Andrew L. Deutsch
ANDREW L. DEUTSCH

ANNEX 1

From: Schwartzman, Joshua
Sent: Monday, December 30, 2019 6:04 PM
To: Michael Krinsky; David Goldstein; Lindsey Frank
Cc: Lawrence, Carl M.; Deutsch, Andrew; Nading, John; Joshua Schwartzman (joshua.schwartzman@dlapiper.com)
Subject: Empresa Cubana v. General Cigar
Attachments: 2019.12.29 Supplemental Expert Report by Richard Carleton Hacker Concerning Relevant Events Since My Expert Report of May 31, 2017 (with Exs A-D).pdf

Counsel:

Pursuant to Fed. Rs. Civ. P. 26(a)(2)(B) and (E), and 26(e), please find attached the Supplemental Expert Report of Richard Carleton Hacker.

Best Regards,

Joshua Schwartzman

Associate

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F +1 212.335.4501

M +1 631.275.4855

E joshua.schwartzman@dlapiper.com



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United States
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ANNEX 2

From: Schwartzman, Joshua
Sent: Monday, December 30, 2019 7:32 PM
To: Michael Krinsky; David Goldstein; Lindsey Frank
Cc: Deutsch, Andrew; Nading, John; Lawrence, Carl M.; Joshua Schwartzman (joshua.schwartzman@dlapiper.com)
Subject: Empresa Cubana v. General Cigar
Attachments: 2019.12.30 Respondent_s Pretrial Disclosures.pdf

Counsel:

Pursuant to Fed. R. Civ. P. 26(a)(3) and 37 CFR s. 2.121, please find attached Respondent's pretrial disclosures.

Best Regards,

Joshua Schwartzman

Associate

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ANNEX 3

RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.

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VICTOR RABINOWITZ (1911-2007)
LEONARD B. BOUDIN (1912-1989)

MICHAEL KRINSKY
ERIC M. LIEBERMAN
DAVID B. GOLDSTEIN
LINDSEY FRANK

NATHAN YAFFE

COUNSEL

TERRY GROSS
CRAIG KAPLAN
CHRISTOPHER J. KLATELL

January 8, 2020

Andrew Deutsch
John Nading
DLA Piper LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, NY 10020-1104

VIA ELECTRONIC MAIL

Re: *Empresa Cubana del Tabaco v. General Cigar Co., Inc., Canc. No. 92025859*
(TTAB)

Counsel:

We are in receipt of the Supplemental Expert Report of Richard Carleton Hacker, dated December 29, 2019 and served on us on December 30, 2019 ("Supplemental Expert Report"), the same day Respondent's pretrial disclosures were due, approximately 2 years and 9 months after Mr. Hacker's initial report and over 2 years and 6 months after his discovery deposition.

Petitioner requests that Respondent immediately withdraw Mr. Hacker's Supplemental Expert Report and agree not to examine Mr. Hacker on any matter included in his Supplemental Expert Report.

If Respondent does not agree to this request, we request a meet and confer to discuss: (a) our objections identified herein and (b) the effect on the trial schedule of the Motion to Exclude the Supplemental Expert Report that we intend to file if Respondent does not agree with Petitioner's request.

All expert disclosures were due by March 15, 2017 and any rebuttal expert disclosures were due by May 31, 2017, approximately two and a half years prior to Mr. Hacker's Supplemental Expert Report. 103 TTABVUE 2; 107-08 TTABVUE (Board's scheduling orders). Supplementation of an expert's previous disclosures were due "before a party's pretrial disclosures are due." TBMP § 401.03.

However, as the Federal Rules of Civil Procedure, the TBMP and the Board's precedent make clear, "[a] supplemental report which seeks to clarify an expert's earlier opinions or provides new examples and illustrations to bolster them is not proper supplementation." *Gemological Institute of America, Inc. v. Gemology Headquarters International, LLC*, 111 U.S.P.Q.2d 1559, 1562 (T.T.A.B. 2014) (internal citations omitted); *see also* TBMP § 401.03 ("Fed. R. Civ. P. 26(e) ... does not allow an expert to bolster previously disclosed opinions or to add new opinions.")

This is exactly what the Supplemental Expert Report attempts to do by including the "additional facts ... which support [Mr. Hacker's] opinions" in his Supplemental Expert Report. *Id.* at ¶3.

For example, Mr. Hacker identifies cigar podcasts as "an *additional* source of information for U.S. cigar consumers." *Id.* at ¶¶ 7-12 (emphasis added). Further, cigar podcasts, including the majority of those cited in the Supplemental Expert Report, have existed since well before Mr. Hacker's initial report. *See The Cigar Authority*, available at <https://thecigarauthority.podbean.com/2010/06/> (podcasts broadcasted since at least June 2010); *Stogie Geeks*, available at <https://stogiegeeks.com/page/61> (podcasts broadcasted since October 2011); *Cigar Nerds* available at <https://cigarnerdpodcast.com/> (podcasts broadcasted since September 2014); and *The Retrohale*, available at <https://theretrohale.libsyn.com/page/10/size/25> (podcasts broadcasted since June 5, 2015).

Mr. Hacker also, *inter alia*, adds the new example (also a new opinion) that "cigar publications have also continued to confirm that premium cigar consumers are well-educated and sophisticated about the cigars they purchase and smoke," Supplemental Expert Report at ¶14, and the new example of how "[p]ublished articles also continue to reinforce the fact which, as my original report stated, is already known to almost all premium cigars consumers, namely that the Cohiba cigar sold in the United States by General Cigar using non- Cuban tobacco is not related to the Cuban Cohiba cigar." *Id.* at ¶¶15-16.

The remedy for this improper Supplemental Expert Report is its exclusion. *See* Fed. R. Civ. P. 37(c)(1).

The Supplemental Expert Report must be excluded because Respondent's "late disclosure of expert witness statements, long after the opposing party would have had an opportunity to depose the declarant on the contents of the statement, nullifies the very purpose of Rule 26(a)(2)(B)." *Gemological Institute of America*, 111 U.S.P.Q.2d. at 1562 (internal citations omitted); *see also* Fed. R. Civ. P. 26(a)(2)(B) (requiring party to disclose, *inter alia*, "a complete statement of all opinions the [expert] witness will express and the basis and reasons for them; [and] ... the facts or data considered by the witness in forming them").

The purpose of Rule 26(a)(2)(B) is to prevent exactly the kind of unfair surprise at trial that Respondent has created here.

Another purpose of Rule 26(a)(2)(B) is to permit the opposing party to depose the expert in advance of trial on all of the bases of his or her opinions and to prepare rebuttal reports. *See Gemological Institute of America*, 111 U.S.P.Q.2d. at 1561-62. As you know, discovery closed in this proceeding long ago and Mr. Hacker was deposed more than two and a half years ago.

Rule 26(e)(2) does not allow supplementation of expert opinions to bolster his or her opinion with new examples, as Hacker does in his Supplemental Expert Report. Rather, it allows an expert the opportunity to correct his or her misleading disclosures. *See Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) (cited by the Board in *Gemological Institute of America*) (“Rule 26(e) envisions supplementation when a party’s discovery disclosures happen to be defective in some way so that the disclosure was incorrect or incomplete and, therefore, misleading.”)


Mr. Hacker does not assert that his initial report was “misleading,”

Further, allowing Respondent to use the Supplemental Expert Report at this late date would only cause unwarranted delay in the trial and allow for the endless bolstering of expert opinions. *See id.*

Given that Respondent’s testimonial period is set to open next week, we request a prompt response.

Petitioner reserves all rights.

Sincerely,



Michael Krinsky
Lindsey Frank

ANNEX 4



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www.dlapiper.com

Andrew L. Deutsch
andrew.deutsch@dlapiper.com
T 212.335.4880
F 212.884.8580

January 11, 2020

VIA E-MAIL

Michael Krinsky
Lindsey Frank
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.
14 Wall Street
New York, NY 10005

Re: Empresa Cubana del Tabaco v. General Cigar Co., Cancellation Proceeding No. 92025859

Dear Michael and Lindsey:

We are responding to your January 8, 2020 letter regarding the Supplemental Expert Report of Richard Carleton Hacker (“Supplemental Expert Report”). Contrary to your assertions, the Supplemental Expert Report is proper supplementation of Mr. Hacker’s May 31, 2017 expert report (“Original Expert Report”) under both Fed. R. Civ. P. 26(e)(2) and TBMP § 401.03. Accordingly, Respondent does not agree to withdraw the Supplemental Expert Report or to exclude matters disclosed in the Supplemental Expert Report from the direct testimony that it may offer through Mr. Hacker at trial.

Under Fed. R. Civ. P. 26(e)(1), a party has a duty to supplement a disclosure or response “in a timely manner if the party learns that in some material respect the disclosure or response is *incomplete* or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” (Emphasis added). Rule 26(e)(2) specifies that for an expert whose report must be disclosed under Rule 26(a)(2)(B), the “party’s duty to supplement extends both to information included in the report and to information given during the expert’s deposition,” and must be made by the time that the party’s pretrial disclosures are due. The Supplemental Expert Report was served on you on December 30, 2019, the date on which Respondent’s pretrial disclosures were due (see 241 TTABVUE 4), so it is timely under Rule 26(a)(2)(B).

Contrary to your assertions, Mr. Hacker offers no new opinions in the Supplemental Expert Report. The Supplemental Expert Report cites additional facts which have arisen or come to the attention of Mr. Hacker after May 31, 2017, the date of the Original Expert Report, and which support the opinions that Mr. Hacker expressed in the Original Expert Report.

Thus, paragraphs 5 and 17 of the Original Expert Report set forth Mr. Hacker’s encounters with premium cigar smokers prior to May 31, 2017, and his opinion, drawn from those encounters, that there is no appreciable consumer confusion between the General Cigar



Michael Krinsky
Lindsey Frank
January 11, 2020
Page Two

Cohiba cigar and the Cuban Cohiba cigar. Paragraphs 5 and 9-12 of the Supplemental Expert Report set forth his conversations with premium cigar smokers occurring after May 31, 2017, both in person and as a guest on cigar podcasts, and explain that these new facts support his original opinion. Similarly, paragraphs 14-16, 18-21, and 23-32 of the Original Expert Report set forth sources of information available to premium cigar consumers as of May 31, 2017, that preclude a likelihood of confusion between the two cigars, while paragraphs 7-8 and 14-17 of the Supplemental Expert Report set forth additional sources of information available to premium cigar consumers that occurred or became known to Mr. Hacker after the date of his Original Expert Report, and which support his original opinion that consumers are not confused.¹ Paragraph 13 of the Supplemental Expert Report updates the facts about restrictions on travel to Cuba, originally addressed in paragraph 22 of the Original Expert Report. In short, the Supplemental Expert Report contains no new opinions and merely provides later-occurring or later-discovered facts that complete the Original Expert Report.

Cubatabaco can hardly claim any unfair surprise from the Supplemental Expert Report. The Board has already stated in this Proceeding that its determination of likelihood of confusion claims is based upon the factual situation *as of the time of trial*.” 122 TTABVUE 7 (emphasis added), citing *Hornby v. TJJ Cos.*, 87 USPQ2d 1411, 1416 (TTAB 2008). Indeed, the principle that facts occurring up to the date of trial are relevant to a determination of likelihood of confusion has long been settled Board law. For example, in *Teledyne Technologies, Inc. v. Western Skyways Inc.*, 78 U.S.P.Q.2d 1203, 1208-09 (TTAB 2006), where likelihood of confusion was raised as grounds to cancel a registration, the Board also considered evidence regarding the lack of actual confusion as of the time of trial, not as of the time that discovery closed. Here, more than two years elapsed between the date of the Original Expert Report and the trial period. Cubatabaco should reasonably have anticipated that Mr. Hacker would supplement his report with facts occurring or discovered after the date of the Original Expert Report.

In fact, Cubatabaco, during its trial period, has already offered factual testimony through its witnesses that it did not make available to General Cigar during the discovery period. For example, the trial Declaration of Enrique Babot Espinoza, dated October 3, 2018 but which Respondent only saw when it was submitted on September 8, 2019, discloses facts occurring after Mr. Babot’s discovery deposition on August 9, 2017. See Babot Declaration (139 TTABVUE) ¶16 (complete data for 2017). The same is true of the Declaration of Lisset

¹ Mr. Hacker has informed us that he did not appear on any cigar podcast prior to May 31, 2017, the date of the Original Expert Report. You may of course inquire into this fact if you choose to examine Mr. Hacker during the trial period.



Michael Krinsky
Lindsey Frank
January 11, 2020
Page Three

Fernandez Garcia, dated October 2, 2018: it speaks as of the date of the declaration and includes facts arising after Mr. Fernandez's August 11, 2017 discovery deposition. See Fernandez Declaration (141 TTABVUE) ¶ 28(h).

Finally, neither of the decisions cited in your letter support your claim that supplementation in this Proceeding is improper. In *Gemological Inst. Of Am., Inc. v. Gemology Headquarters Int'l, LLC*, 111 USPQ2d 1559 (TTAB 2014), the party offering a supplemental expert report admitted that it contained opinions not in the original report and was submitted to rebut trial testimony of the opposing party. The Board excluded the report because it was not submitted to correct inaccuracies in the original expert report "or to complete an otherwise incomplete earlier expert report with newly discovered information." *Id.* at 1562.

In contrast, Mr. Hacker's Supplemental Expert Report was not submitted to rebut any evidence submitted by Petitioner during its trial period, and does not contain additional expert opinions. It is submitted to complete Mr. Hacker's Original Expert Report with later or newly-discovered information that supports Mr. Hacker's original opinions, which *Gemological Inst.* makes clear is proper supplementation. The Original Expert Report was incomplete, not due to any failure of the expert or Respondent, but because there was more than a two-year gap between the date of the report and the beginning of the trial period, during which additional facts relevant to likelihood of confusion as of the time of trial occurred or were discovered.

Akeva L.L.C. v. Mizuno Corp., 212 F.R.D. 306 (M.D.N.C. 2002), is not a trademark proceeding, but a patent infringement suit. The distinction is essential, because likelihood of confusion in a trademark case is measured as of the time of trial, while the question of whether an article infringes a patent is determined as of the time the article is first made, used, sold, or offered for sale. 35 U.S.C. § 271.

In *Akeva*, the plaintiff's expert performed tests on and issued a report regarding the allegedly infringing elements of the defendant's shoes. The defendant thereafter offered its own expert's report which tested the shoes in a different way. The plaintiff then notified the defendant of an intention to have its expert perform another test on the shoes, which plaintiff characterized as supplementation. The *Akeva* court excluded the second expert report because it appeared to be impermissible rebuttal of the defendant's expert report and because the plaintiff's expert could have conducted his second test before the disclosure deadline for expert reports. *Id.* at 310-11.

Akeva is clearly inapplicable to the present Proceeding, because in trademark cases, determining whether there is a likelihood of confusion requires consideration of facts occurring up to trial. While the expert in *Akeva* could have conducted the second test earlier, Mr. Hacker could not have reported facts occurring after May 31, 2017 in his Original Expert Report.



Michael Krinsky
Lindsey Frank
January 11, 2020
Page Four

As you have requested a meet and confer, we are available for a telephone conference on January 13, 14, or 15, 2020 at 1:00 pm EST or later. Please let us know what times you prefer.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Andrew Deutsch', written over a light yellow vertical line.

Andrew L. Deutsch

ANNEX 5

From: Deutsch, Andrew
Sent: Tuesday, January 21, 2020 9:26 PM
To: Lindsey Frank; Nading, John; Schwartzman, Joshua
Cc: Lawrence, Carl M.; Michael Krinsky; David Goldstein
Subject: RE: Empresa Cubana v. General Cigar

Lindsey:

The General Counsel of General Cigar has been traveling and I was not able to discuss Cubatabaco's proposals with him until today.

Here is General Cigar's response:

1. Hacker Supplemental Deposition: General Cigar will agree to provide a supplemental discovery deposition of Mr. Hacker limited to the matters covered in his Supplemental Expert Report, and to an extension of General Cigar's trial period to March 13, 2020 to permit that deposition. However, General Cigar will not agree to Cubatabaco also reserving the right to move to strike either Mr. Hacker's Supplemental Report or his trial deposition covering the matters in his Supplemental Report on the grounds of untimely supplementation or unfair surprise, or to make its trial cross-examination of Mr. Hacker under protest. As stated in prior communications, General Cigar's supplementation was timely and proper under the Federal Rules of Civil Procedure and Board Rules. While we do not agree with your client's objection that it was unfairly surprised by the timing of the Supplemental Report, any objection of that nature would be fully remedied by the opportunity to take Mr. Hacker's supplemental discovery deposition well prior to cross-examining him at trial. If this counter-proposal is unacceptable, then please advise when you intend to call the Interlocutory Attorney regarding any motion to strike/exclude.



Best regards,

Andy

Andrew L. Deutsch
Partner

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M +1 917.861.3315

E andrew.deutsch@dlapiper.com



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ANNEX 6

From: Lindsey Frank <lfrank@rbskl.com>
Sent: Thursday, January 23, 2020 11:29 AM
To: Deutsch, Andrew; Nading, John; Schwartzman, Joshua
Cc: Lawrence, Carl M.; Michael Krinsky; David Goldstein
Subject: RE: Empresa Cubana v. General Cigar

[EXTERNAL]

Dear Andy:

Thank you for your email.

1. Hacker Supplemental Report: Your counterproposal concerning Mr. Hacker is unacceptable; we, therefore, would like to schedule a call with the Interlocutory Attorney for Monday. I am traveling internationally for the remainder of today and so it will be difficult to arrange a call for tomorrow.

Please advise as to your availability on Monday.

Best regards,
Lindsey

Lindsey Frank, Esq.
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.
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From: Deutsch, Andrew <andrew.deutsch@dlapiper.com>
Sent: Tuesday, January 21, 2020 9:26 PM
To: Lindsey Frank <lfrank@rbskl.com>; Nading, John <john.nading@dlapiper.com>; Schwartzman, Joshua <joshua.schwartzman@dlapiper.com>
Cc: Lawrence, Carl M. <carl.lawrence@dlapiper.com>; Michael Krinsky <mkrinsky@rbskl.com>; David Goldstein <dgoldstein@rbskl.com>
Subject: RE: Empresa Cubana v. General Cigar

Lindsey:

The General Counsel of General Cigar has been traveling and I was not able to discuss Cubatabaco's proposals with him until today.

Here is General Cigar's response:

1. Hacker Supplemental Deposition: General Cigar will agree to provide a supplemental discovery deposition of Mr. Hacker limited to the matters covered in his Supplemental Expert Report, and to an extension of General Cigar's trial period to March 13, 2020 to permit that deposition. However, General Cigar will not agree to Cubatabaco also reserving the right to move to strike either Mr. Hacker's Supplemental Report or his trial deposition covering the matters in his Supplemental Report on the grounds of untimely supplementation or unfair surprise, or to make its trial cross-examination of Mr. Hacker under protest. As stated in prior communications, General Cigar's supplementation was timely and proper under the Federal Rules of Civil Procedure and Board Rules. While we do not agree with your client's objection that it was unfairly surprised by the timing of the Supplemental Report, any objection of that nature would be fully remedied by the opportunity to take Mr. Hacker's supplemental discovery deposition well prior to cross-examining him at trial. If this counter-proposal is unacceptable, then please advise when you intend to call the Interlocutory Attorney regarding any motion to strike/exclude.

Best regards,

Andy

Andrew L. Deutsch
Partner

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ANNEX 7

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LEONARD B. BOUDIN (1912-1989)

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LINDSEY FRANK

NATHAN YAFFE

COUNSEL

TERRY GROSS
CRAIG KAPLAN
CHRISTOPHER J. KLATELL

January 26, 2020

Andrew Deutsch
John Nading
DLA Piper LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, NY 10020-1104

VIA ELECTRONIC MAIL

Re: *Empresa Cubana del Tabaco v. General Cigar Co., Inc., Canc. No. 92025859*
(TTAB)

Counsel:

Petitioner continues to object to the Supplemental Expert Report by Richard Carleton Hacker, produced on December 30, 2019 (the "Supplemental Report"). Petitioner believe that a motion to exclude/strike same is appropriate and will seek authorization from the Board to file same on Tuesday's call with the Interlocutory Attorney.

A motion to exclude/strike the Supplemental Expert Report is appropriate, *inter alia*, because production at this late date of the information and materials identified in this letter, to which Petitioner is entitled under TBMP § 401.03 and Fed. R. Civ. P. 26(a)(2)(B), would cause undue delay to the trial and is simply not workable.

By waiting until the middle of the trial to file Mr. Hacker's Supplemental Expert Report, over 2.5 years after filing Mr. Hacker's original Expert Report, Respondent has denied Petitioner the opportunity to access and review the voluminous materials cited in Mr. Hacker's Supplemental Expert Report.

Respondent has also, therefore, denied Petitioner the opportunity to sufficiently prepare to examine Mr. Hacker, whether at a discovery deposition or on cross examination at trial in the event Respondent offers Mr. Hacker's testimony on any of the matters addressed in his Supplemental Expert Report, as you have indicated Respondent will do.

By way of example, Mr. Hacker makes general statements about the role of cigar podcasts, *see* Supplemental Expert Report at ¶¶ 7-9, 11-12 citing, at one point, to *The Retrohale*, *The Cigar Authority*, *Cigar Hacks*, *Stogie Geeks*, *Cigar Talk*, *Cigar Snob*, and *Cigar Nerds* podcasts as “the better-known podcasts.” *Id.*, at ¶ 7.

These seven (7) podcast series alone have broadcast well over 1,000 episodes, each of which, upon information and belief, lasts 1-2 hours. It would take 6-12 months for a person working 40-hours a week just to listen to that amount of material, not taking into account the amount of time it would take to evaluate Mr. Hacker’s assertions about them.

Mr. Hacker also states that he has “often been invited as a guest on some of these podcasts” Supplemental Expert Report at ¶ 9 (emphasis added), but only identifies four of the “most recent” podcasts in which he has appeared. *Id.* at ¶ 10. Neither Respondent nor Mr. Hacker has identified which other podcasts he has appeared on, nor have they provided copies (or access to copies of) same, thus prohibiting Petitioner from being able to properly prepare to examine Mr. Hacker, whether in a discovery deposition or at trial.

Without prejudice to Petitioner’s objection to the Supplemental Expert Report and intention to move to exclude/strike same, and reserving all rights, we request that Respondent provide as soon as possible, and well in advance of any discovery deposition, cross-examination or introduction of testimony by Mr. Hacker concerning his Supplemental Expert Report, the following information and materials related to the Supplemental Expert Report.

We note that this information and materials is the same or similar to the information and materials Respondent produced prior to Mr. Hacker’s discovery deposition on his original Expert Report.

A. Facts or Data that Mr. Hacker Considered in Forming His Opinions (*see* Fed. R. Civ. P. 26(a)(2)(B)(ii))

1. All documents that Mr. Hacker considered in forming the opinions expressed in his Supplemental Report.

If Mr. Hacker did not consider any documents other than those cited in his Supplemental Report, please state so;

2. All documents provided to Mr. Hacker by Respondent or Respondent’s attorneys and that Mr. Hacker considered in forming the opinions expressed in his Supplemental Report.

If Mr. Hacker was not provided any documents by Respondent or Respondent’s attorneys, please state so; and

3. Identify assumptions provided by Respondent or Respondent's attorneys and that Mr. Hacker relied on in forming the opinions expressed in his Supplemental Report.

If Mr. Hacker was not provided with any assumptions by Respondent or Respondent's attorneys, please state so.

i. Mr. Hacker's Interactions with Consumers and Tobacconists

1. All notes or recordings of, and memoranda and other documents concerning Mr. Hacker's interactions, discussions and communications with consumers, consumer cigar smokers and cigar smokers since May 31, 2017.

If there is no such material, please so state;

2. All notes and recordings of, and memoranda and other documents concerning, Mr. Hacker's interactions, discussions and communications with tobacconists since May 31, 2017.

If there is no such material, please so state;

3. Identify all conferences, workshops and other events related to cigars that Mr. Hacker attended or participated in since May 31, 2017, if any;
4. All documents or communications related to all conferences, workshops and other events related to cigars that Mr. Hacker attended or participated in since May 31, 2017, if any; and
5. Mr. Hacker's calendars, diaries and similar materials (whether digital or paper) since May 31, 2017 in which Mr. Hacker or his assistants recorded or noted Mr. Hacker's appointments, events he attended or was to attend, and his activities.

ii. Podcasts

1. All podcasts in which Mr. Hacker appeared as a guest or otherwise participated in;
2. Identify and produce all podcasts that Mr. Hacker listened to or watched in the course of preparing his Supplemental Report, if any; and, if Mr. Hacker downloaded or saved any material from those podcasts, please provide same.

Also, identify which portions of these podcasts Mr. Hacker listened to or watched;

3. All documents and communications regarding cigar podcasts in Mr. Hacker's possession, custody or control, including, without limitation: communications between Mr. Hacker and any producer, host, moderator, presenter or any other person related to those podcasts; and any invitations to Mr. Hacker to be a guest on one of these podcasts; and
4. All notes or recordings of, memoranda and other documents concerning Mr. Hacker's interactions, discussions and communications with podcast listeners.

If there is no such material, please so state.

iii. Specific Assertions in Mr. Hacker's Supplemental Expert Report

1. All documents Mr. Hacker reviewed, if any, concerning his assertion in his Supplemental Report that "American cigar smokers are also fully aware that the only Cohiba they can purchase in the U.S. is the General Cigar Cohiba, as it is not a Cuban product," Supplemental Report, at ¶ 13;
2. All publications, in addition to the one cited in his Supplemental Report, that Mr. Hacker reviewed to support his assertion in his Supplemental Report that "Since the date of my original report, cigar publications have also continued to confirm that premium cigar consumers are well-educated and sophisticated about the cigars they purchase and smoke," at ¶ 14;
3. All publications, in addition to those cited in his Supplemental Report, that Mr. Hacker reviewed to support his assertion in his Supplemental Report that "Published articles also continue to reinforce the fact which, as my original report stated, is already known to almost all premium cigars consumers, namely that the Cohiba cigar sold in the United States by General Cigar using non-Cuban tobacco is not related to the Cuban Cohiba cigar," at ¶ 15;
4. Identify all websites that Mr. Hacker visited in the course of preparing his Supplemental Report, if any; and, if Mr. Hacker downloaded or saved any material from those websites, please provide same; and
5. All documents, if any, Mr. Hacker reviewed concerning his assertion in his Supplemental Report about the "cut[ting] down [of] the number of American cigar smokers visiting Cuba," at ¶ 13.

B. Mr. Hacker's Qualifications and Cases (see Fed. R. Civ. P. 26(a)(2)(B)(iv) and (v))

1. The list of Mr. Hacker's publications since Mr. Hacker's Expert Report dated May 31, 2017. The term "publication" includes, without limitation, all postings by Mr. Hacker to the internet or social media;
2. The list of publications in which Mr. Hacker has served as an editor since May 31, 2017.

If there is no such material, please so state.

3. The list of publications in which Mr. Hacker has served as a contributing editor since May 31, 2017.

If there is no such material, please so state.

4. A list of all cases in which Mr. Hacker has testified as an expert at trial or by deposition since May 31, 2017.

If there is no such material, please so state.

5. All communication between Mr. Hacker and Robb Report or anyone working for Robb Report since May 31, 2017.

If there is no such material, please so state; and

6. All communications between Mr. Hacker and Skyhorse Publishing since May 31, 2017.

If there is no such material, please so state.

Please produce the information and documents requested herein categorized to match each numbered request above.

If you or Mr. Hacker wish, you may, of course, mark the produced material confidential or confidential-attorney eyes only.

Sincerely,

/Lindsey Frank/

Lindsey Frank

ANNEX 8



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February 3, 2020
VIA E-MAIL

Michael Krinsky
Lindsey Frank
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.
14 Wall Street
New York, NY 10005

Re: Empresa Cubana del Tabaco v. General Cigar Co., Cancellation Proceeding No. 92025859

Dear Michael and Lindsey:

We are responding to your January 26, 2020 letter regarding the Supplemental Expert Report of Richard Carleton Hacker ("Supplemental Expert Report"). This letter was written after our call to the Interlocutory Attorney of January 28, 2020.

Your legal objections to the Supplemental Expert Report are groundless, for the reasons already set forth in our letter to you of January 11, 2020, and your reiteration of those objections in your new letter are just as lacking in merit. The Supplemental Expert Report was timely served under Fed. R. Civ. P. 26(e)(2) and TBMP § 401.03, as shown in our prior letter. We reserve the balance of legal argument to be set forth in General Cigar's opposition to Cubatabaco's motion to strike the Supplemental Expert Report, and do not waive any claim, defense or position by doing so.

We do address the factual assertion in your January 26, 2020 letter that receipt of the Supplemental Expert Report would cause "undue delay" in the trial or be "not workable," and we expect that you will make the facts below known to the Board in Cubatabaco's motion papers.

Your assertion that you would have to review thousands of hours of cigar podcasts in order to depose Mr. Hacker is fundamentally untrue. Mr. Hacker's sole statements about cigar podcasts in his Supplemental Expert Report are the following:

- Since the date of his Original Expert Report, he has become aware that cigar podcasts provide an additional source of information about cigars to U.S. cigar smokers. Supplemental Expert Report ¶¶ 7-8. That cigar podcasts provide additional information to listeners about cigars is a fact that Cubatabaco cannot controvert in good faith. To depose Mr. Hacker on this anodyne statement certainly does not require you to listen to thousands of hours of cigar podcasts.



Michael Krinsky
Lindsey Frank
February 3, 2020
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- Mr. Hacker reported that he has been interviewed as a guest on some podcasts regarding cigars, and that no statements were made by consumers calling in suggesting any confusion regarding the origins of the General Cigar Cohiba cigar. Supplemental Expert Report ¶¶ 9-10. These statements can be verified by clicking through on the links provided in the Supplemental Expert Report, where the full podcasts can be heard. Mr. Hacker's podcast appearances on Retrohale and Cigar Authority were each approximately one hour, and those on Cigar Hacks and Stogie Geeks were approximately 90 minutes. In addition, as noted below, Mr. Hacker appeared on two other podcasts which are primarily devoted to liquor/spirits, but where he also spoke about cigars:

<https://www.iheart.com/podcast/256-happy-hour-radio-30979585/episode/cigar-maestro-richard-carleton-hacker-49098789/>

<https://living-proof-conversations-for-bartenders.simplecast.com/episodes/33-cigars-pairings-and-new-spirits-with-richard-carleton-hacker-VzrgRwNN>.

The Happy Hour Radio podcast lasted 43 minutes, and the Living Proof podcast (based in Australia) lasted 45 minutes. Thus, at most, you would need to listen to about six hours of podcasts in order to prepare to examine Mr. Hacker on these statements.

- Mr. Hacker's statement that the Trump Administration has tightened restrictions on Americans traveling to Cuba since the Original Expert Report (Supplemental Expert Report ¶ 13) is a matter of public record. So is his statement that there has been a decline in American tourism to Cuba since those restrictions went into effect. Again, it would not be burdensome for Cubatabaco to prepare to question Mr. Hacker on the statements.
- The sources for Mr. Hacker's other statements are cited in or attached to the Supplemental Expert Report.

While your letter seeks a volume of additional written materials from Mr. Hacker, Cubatabaco is not entitled to most of these materials under the Federal Rules of Civil Procedure. An expert's obligation to disclose information prior to examination is limited to the matters set forth in Fed. R. Civ. P. 26(2)(B). The Supplemental Expert Report contains the information necessary to satisfy subsections (i) and (iii) of that Rule. In addition to the materials cited in the



Michael Krinsky
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Page Three

Supplemental Expert Report, Mr. Hacker considered certain websites, which are shown on the attached list, satisfying section (ii) of the Rule. A list of publications authored by Mr. Hacker since the date of his Original Expert Report is attached, satisfying subsection (vi) of the Rule. Mr. Hacker has not testified as an expert by trial or deposition within the last four years other than in this Proceeding, so there is no further disclosure to be made under subsection (v) of the Rule. Regarding subsection (vi) of the Rule, Mr. Hacker's current compensation rate for his expert services is \$500/hour, which applies to his work on the Supplemental Expert Report, as well as any further testimony he may give in the matter.

General Cigar reserves all additional argument to its opposition papers.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Andrew Deutsch', written over a light blue horizontal line.

Andrew L. Deutsch

LIST OF PUBLICATIONS BY RICHARD CARLETON HACKER FROM MAY 31, 2017 THROUGH DECEMBER 31, 2019

Note: the dates given for each Robb Report Digital article refers to the deadlines in which each article was due. The actual appearance (posting) of these articles on the internet could be days, weeks, or months after the deadline date, depending on website space available and the scheduling of the website subjects.

Magazines are listed in bold face, to keep all articles in chronological order. Magazine articles are recapped at the bottom of the list.

5/31 ROBB REPORT – Digital (Father’s Day) CIGAR Slide Show)

6/12 ROBB REPORT – Digital N&N - Plasencia Cigar review

7/28 ROBB REPORT – Digital - Villiger La Flor De Ynclan review

8/14 ROBB REPORT – digital – S.T. Dupont Travel Humidor

September 2017 ROBB REPORT Magazine - cigar roundup

October 2017 ROBB REPORT Magazine – S.T. Dupont’s 145th Anniversary humidor

December 2017 ROBB REPORT Magazine – Cigar Roundup

10/11 ROBB REPORT – Digital - Smoke Scene: Q&A with Four Seasons DC Cigar Sommelier

10/26 - ROBB REPORT - Digital – Las Vegas Del Frisco's Cigar Sommelier Q&A

10/31 - ROBB REPORT – Digital - French Laundry cigar sommelier Q&A

11/22 ROBB REPORT – Digital – Camp Camacho article

11/25 ROBB REPORT – Digital – S.T. Dupont Cigar Cutter, Churchill ashtray

2018

1/4 ROBB REPORT - DIGITAL -Mr. C's Restaurant, Beverly Hills Cigar Night

1/15 – ROBB REPORT N&N DIGITAL
Year of the Dog Davidoff cigar, Davidoff Duocut, traveling cigar case, and Johnnie Walker Blue Label Scotch.

2/1 ROBB REPORT N&N DIGITAL
The Old Homestead Cigar Bar At Caesars Palace - A Cigar-Friendly Dining Experience

3/1 ROBB REPORT N&N Digital
New cigars: Villager La Vencedor, Montecristo, Macanudo Red

3/26 ROBB REPORT –June Issue Best of Best
Preliminary List of cigars for the June 2018 issue

6/8 ROBB REPORT – N&N Digital

San Francisco Fairmont Hotel pre-embargo cigar lounge
(Vendetta) in men's store

6/12 ROBB REPORT – Digital
Five Father's Day cigars to buy/smoke

6/29 - ROBB REPORT – N&N Digital
The current Nicaraguan cigar situation

7/9 – ROBB REPORT Magazine – Sept 2018 Issue
Gallery – Davidoff 50th Anniversary Diademas

7/20 – ROBB REPORT – N&N - Digital
Review - The new Camacho candela

8/10 ROBB REPORT Magazine – September 2018 Gallery
Cohiba Spectre

8/27-ROBB REPORT N&N Digital
Cuban Alternative cigars – by country – i.e. cigars to smoke
instead of Cuban cigars.

10/28 TASTING PANEL Magazine – December 2018 Issue
Davidoff Chef's Cigar

2019

1/14 ROBB REPORT DIGITAL
Year of the Pig Davidoff Cigar, whiskies, chocolates

3/28 ROBB REPORT – Digital
Best Havana cigars

4/2 ROBB REPORT – Digital

“The best places to smoke a cigar in Las Vegas.”

4/10 ROBB REPORT – June Magazine

Best of Best Cigars

4/10 ROBB REPORT – June Issue

Don Carlos, “The Man” Cigar tribute

4/10 ROBB REPORT – June Issue

Carlito Fuente Q&A “Favorites” (Panama hat quote)

4/16 ROBB REPORT – Digital

C.Gars Cuban Cigar London auction - vintage and pre-embargo
Havanas

7/5 ROBB REPORT –SEPT ISSUE

“The Man” Humidor – Special Carlos Fuente, Sr.
Commemorative

8/15 – ROBB REPORT-DIGITAL

Cigar Family Charitable Foundation and the Fuente Family
Foundation

11/18 ROBB REPORT – DIGITAL

Holiday cigar gift guide, with cigar accessories
Title: From Stogies to Table Lighters – the 15 Best Gifts for
Cigar Smokers

RECAP OF MAGAZINE ARTICLES SINCE 5/31/17

**September 2017 - ROBB REPORT Magazine - cigar
roundup**

**October 2017 - ROBB REPORT Magazine – S.T. Dupont's
145th Anniversary humidor**

**December 2017 - ROBB REPORT Magazine – Cigar
Roundup**

Sept 2018 – ROBB REPORT Magazine – (2 articles)

Gallery – Davidoff 50th Anniversary Diademas

Gallery - Cohiba Spectre

**December 2018 - TASTING PANEL Magazine –
Davidoff Chef's Cigar**

June 2019 - ROBB REPORT (3 articles)
Best of Best Cigars

Don Carlos, "The Man Cigar" tribute

Carlito Fuente Q&A "Favorites" (Panama hat quote)

**MATERIALS CONSULTED BY RICHARD CARLETON HACKER
IN PREPARATION OF SUPPLEMENTAL EXPERT REPORT**

Cigaraficionado.com

<https://www.cigaraficionado.com/article/trump-administration-announces-new-restrictions-on-cuba-travel-and-commerce>

<https://www.cigaraficionado.com/article/frequently-asked-questions-how-trump-s-policy-affects-americans-looking-to-travel-to-cuba>

<https://www.cigaraficionado.com/article/president-trump-cuts-cuba-travel-changes-obama-era-rules-19441>

Stogiepress.com

Halfwheel.com

Tobaccobusiness.com

<https://tobaccobusiness.com/trump-administration-announces-policy-changes-for-cuba-and-nicaragua/>

Cigar-coop.com

Jrcigars.com –

<https://www.jrcigars.com/blending-room/cuban-cigars/cuban-cohiba-review/2018/07/11/#>

Wikipedia.com

[https://en.wikipedia.org/wiki/Cohiba_\(cigar_brand\)](https://en.wikipedia.org/wiki/Cohiba_(cigar_brand))

holts.com

<https://www.holts.com/clubhouse/cuban-cigars/cuban-vs-dominican-cohiba-cigars>

<https://www.holts.com/clubhouse/cuban-cigars/why-are-cuban-cigars-so-good>

[tripadvisor.com](https://www.tripadvisor.com)

[usatoday.com](https://www.usatoday.com)

[cnn.com](https://www.cnn.com)

[treasury.gov](https://www.treasury.gov) -